(8)

No. 92-9093

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1993 TERM

John Joseph Romano,

Petitioner,

vs.

State of Oklahoma,

Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

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Brief for the States of Ohio, Arkansas, Connecticut, Delaware, Mississippi, Montana, Nebraska, Pennsylvania, South Carolina and Virginia as Amici Curiae in Support of Respondent

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INTEREST OF THE AMICI CURIAE

The amici States are involved through their criminal justice systems in cases in which the death penalty is imposed as the appropriate sanction. Capital sentences are imposed by the authority of and carried out in the name of each of these States. In performing these functions, the States are also carrying out the will of their citizens, who have indicated support for the death penalty through their legislatures by including this ultimate sanction within the range of permissible punishments. And in performing these functions, the amici States expend tremendous resources of time, personnel, and money to solve and prosecute the crime involved, to defend the validity of the conviction and sentence both on direct review and in collateral challenges, and eventually to fulfill the final decree.

Neither the amici States nor their citizens have a legitimate interest or desire to have the death penalty imposed in cases in which such a penalty would be inappropriate. The amici States and their citizens do have a legitimate interest in ensuring that the death penalty is reserved only for the most heinous of crimes and is applied only under the most serious circumstances. In such cases, however, the amici States have a vital interest in ensuring that the tremendous amount of their resources that are brought to bear to obtain a capital sentence are not easily held for naught.

This case involves the familiar tension between the twin goals of fairness to a defendant who has received a capital sentence and fairness to a State and its citizens, which have an interest in the finality and application of legitimate criminal sanctions. The amici States are the sovereign entities that are most directly affected by the balance this Court may draw to reconcile these opposing interests. In this case, the amici States urge the Court to affirm the judgment of the Oklahoma Court of Criminal Appeals, which struck the appropriate balance here. The amici States also urge this Court to reject as a proposition of law that the mere truthful mention to the jury that another jury has previously imposed a capital sentence on this defendant in an entirely different

case must so undermine the jury's sense of responsibility that constitutional due process is *per se* violated, such that any attempt to impose a capital sentence on the facts of this particular case is necessarily void.

QUESTION PRESENTED

DOES ADMISSION OF EVIDENCE THAT A CAPITAL DEFENDANT ALREADY HAS BEEN SENTENCED TO DEATH IN ANOTHER CASE IMPERMISSIBLY UNDERMINE THE JURY'S SENSE OF RESPONSIBILITY FOR DETERMINING THE APPROPRIATENESS OF THE DEFENDANT'S DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS?

SUMMARY OF ARGUMENT

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), this Court held that the Eighth and Fourteenth Amendments are violated where a jury is affirmatively misled about its actual responsibility for imposition of a capital sentence. Subsequent decisions interpreting and applying *Caldwell* have made clear that its holding is limited to cases in which the jury is affirmatively misled into a false belief that such responsibility lies elsewhere.

Knowledge on the part of a sentencing jury that a capital defendant has already been convicted of murder and sentenced to death in a different case does not affirmatively mislead the jury about its proper role in the sentencing process. Such information, if accurate and correct, may or may not be relevant to the sentencing determination under principles of state law, but the jury's awareness of such information does not, in and of itself, violate due process by so undermining the jury's sense of responsibility for determining the appropriate sentence that it taints and distorts the entire judicial proceedings.

Rather than applying the *Caldwell* standard in such cases, this Court should instead apply the "fundamental fairness"

standard that was approved in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), to determine whether the jury's awareness that the defendant received the death sentence in a previous case violates due process when the jury exercises its authority to consider and judge the facts presented in an entirely different case.

ARGUMENT

I. THIS COURT'S DECISION IN *CALDWELL v. MISSISSIPPI*, 472 U.S. 320 (1985), IS LIMITED TO CASES IN WHICH A JURY IS AFFIRMATIVELY MISLED AS TO ITS SENSE OF RESPONSIBILITY FOR IMPOSITION OF THE DEATH PENALTY.

This Court's capital sentencing jurisprudence under the Eighth and Fourteenth Amendments has sought to balance two competing interests. On the one hand, the Court has insisted on a process that focuses and directs the sentencer's discretion in imposing the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972). In *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), this Court stated:

> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

This special concern with the fairness of the process stems directly from the unique and extremely grave nature of the death penalty itself. There are numerous statements to this effect, both by individual Justices and collectively from this Court, with the following statement perhaps being illustrative of this view:

> Death as a punishment is unique in its severity and irrevocability. Since *Furman v. Georgia*, 408 U.S. 238 (1972), this Court's decisions have made clear that States may impose this ultimate sentence only if they follow procedures that are designed to assure reliability in sentencing determinations.

Barclay v. Florida, 463 U.S. 939, 958 (1983) (Stevens, J., concurring). And it is "the qualitative difference of death from all other punishments" that "requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

On the other hand, there is the practical reality that not every departure from an established process, which is itself wholly sound, will cause a result that is improper or inappropriate to the particular circumstances of the offender's crime and background. As summarized by Chief Justice (then Associate Justice) Rehnquist:

> Similarly, this Court's recent opinions concerning the Eighth Amendment, . . . have also noted that in general the Eighth Amendment is satisfied where the procedures ensure that the sentencer's discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Zant v. Stephens*, 462 U.S. 862, 874 (1983); *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (plurality opinion). Thus, in both *Zant* and *Barclay* we upheld death sentences despite the fact that they had been based in part on invalid aggravating circumstances, where the jury also had found valid aggravating circumstances.

Caldwell v. Mississippi, 472 U.S. 320, 348 (1985) (Rehnquist, J., dissenting).

In *Caldwell v. Mississippi, supra*, this Court reconciled the tension between these interests in a narrow and egregious factual context. In *Caldwell*, the prosecutor made affirmative representations to the jury which created the misimpression that they were not the final determiners of the death penalty,

and the trial court failed to take any action to correct that misimpression which misled the jury. The Court concluded:

> . . . it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

472 U.S. at 328-29. In concurrence, Justice O'Connor added:

> I believe the prosecutor's misleading emphasis on appellate review misinformed the jury concerning the finality of its decision thereby creating an unacceptable risk that the "death penalty [may have been] meted out arbitrarily or capriciously," or through "whim . . . or mistake."

472 U.S. at 343 (O'Connor, J., concurring) (citations omitted).

In *Caldwell*, the Court concluded that the entire capital sentencing process itself was hopelessly undermined by the prosecutor's misleading comments to the jury. One of the assumptions that underlies or perhaps even mandates discretion in capital sentencing is the basic assumption that the sentencer is capable of exercising discretion to perform that task if given proper guidance. As noted by the Court:

> Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with — and indeed as indispensable to — the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case."

472 U.S. at 330 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Accordingly, the Court concluded that the misleading impression given to the jury that it did not bear this responsibility itself gave the jury "a view of its role

in the capital sentencing procedure that was fundamentally incompatible" with the foundational premises that underlie this Court's capital sentencing jurisprudence. *Caldwell*, 472 U.S. at 340.

Subsequent cases demonstrate that the reach of *Caldwell* has been limited to the outright sabotaging of an otherwise fair process which occurred in that case, where the prosecutor presented the jury with an affirmative misrepresentation of its role in capital sentencing. Thus, for example, in *Darden v. Wainwright*, 477 U.S. 168, 184 n.15 (1986), this Court stated:

> *Caldwell* is relevant only to certain types of comment — those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.

In *Darden*, the Court rejected a claim that the prosecutor's impassioned and improper arguments to the jury in that case constituted a Caldwell error, stating in the same footnote:

> In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process. If anything, the prosecutors' comments would have had the tendency to increase the jury's perception of its role.

Similarly, in *Dugger v. Adams*, 489 U.S. 401 (1989), the Court again characterized the holding in *Caldwell* as being limited to statements that affirmatively mislead the jury in order to diminish improperly the jury's sense of its own ultimate responsibility. 489 U.S. at 407. Although in the end *Dugger* was decided on the basis of procedural default, the Court declared that "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Id.* Under Florida law, a jury's verdict on sentencing constituted a recommendation that the trial judge could disregard. As

a result, the trial judge in *Dugger* repeatedly advised the jury that he was the ultimate determiner of the appropriate sentence, and they were not. This was misleading, however, as the jury was not told that their recommendation could be set aside only where the judge had a clear and convincing belief that the jury's recommendation was wrong, and thus the alleged error was understood to implicate *Caldwell*. See *id.* at 407-08.

Finally, in *Sawyer v. Smith*, 497 U.S. 227 (1990), the Court considered a *Caldwell*-type claim in a case that was ultimately decided on grounds of procedural default. In the course of its opinion, the Court characterized *Caldwell* as a case in which the jury was affirmatively misled into holding false beliefs about the nature of its responsibilities in the capital sentencing process. As the Court summarized: "In *Caldwell*, we held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere." *Id.* at 233; see also *id.* (basis for ruling in *Caldwell* was that "false information of this type might produce 'substantial unreliability as well as bias in favor of death sentences' ") (quoting *Caldwell*, 472 U.S. at 330); *id.* at 235 (in *Caldwell*, "false prosecutorial comment created an 'unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously' ") (quoting *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring)) (internal brackets and quotes omitted).

This Court therefore has determined in numerous subsequent decisions that its holding in *Caldwell* is limited to cases where the jury's sense of responsibility for determining a capital sentence is improperly diminished because it was affirmatively misled into a false belief that such responsibility lies not upon its own shoulders, but instead lies elsewhere. That situation, however, does not obtain in this case, as will be shown below.

II. KNOWLEDGE ON THE PART OF A SENTENCING JURY THAT A CAPITAL DEFENDANT HAS ALREADY BEEN SENTENCED TO DEATH IN ANOTHER CASE DOES NOT AFFIRMATIVELY MISLEAD THE JURY AS TO ITS ROLE AND THUS DOES NOT, IN AND OF ITSELF, UNDERMINE THE SENTENCING JURY'S SENSE OF RESPONSIBILITY FOR DETERMINING THE APPROPRIATE SENTENCE.

Unlike *Caldwell*, this case does not involve a prosecutor who has affirmatively misled the jury about its ultimate sentencing responsibility. Nor does this case involve a trial judge's failure to correct such a misimpression either by silence or, as in *Caldwell*, by affirmative ratification of the prosecutor's comments. Rather, this case involves the jury's extraneous receipt of an objectively correct fact — that the defendant had received a prior death sentence in another case — during the course of the prosecutor's attempt to prove the aggravating circumstances that are authorized by statute to be considered as part of the capital sentencing process. It does not appear that the prosecutor ever argued or even attempted to suggest that a capital sentence would be justified in this case because Petitioner had previously been sentenced to death in another case. Moreover, in this case the trial judge properly instructed the jury about their role and their responsibilities in determining the appropriate sentence. Therefore, regardless of whether the mention of the defendant's previous capital sentence was relevant, material, or proper as a matter of state evidentiary law, its receipt by the jury did not violate the due process of law that is guaranteed in the Federal Constitiution. See, e.g., *Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida, supra.*

Petitioner asks this Court to make a presumptive leap to find that the mere knowledge that the defendant was sentenced to death in another case would, in and of itself, so undermine the jury's sense of responsibility that it would be unable to make a proper sentencing determination in this case. He thus asks this Court to hold that the mere mention of this fact would have the same extreme effect

as did the affirmatively misleading statements in *Caldwell*, by unavoidably distorting and tainting an otherwise fair sentencing process. There is a crucial difference, however, between a juror's mere knowledge of certain facts and the same juror's capacity to act impartially after considering and evaluating all the facts presented in a particular case.

Thus, for example, not every trial in which there has been pretrial publicity of which jurors are aware will necessarily result in a reversal of a conviction on due process grounds. Pretrial publicity which makes a juror aware of certain facts does not, *per se*, destroy a juror's ability to be impartial. See e.g., *Dobbert v. Florida*, 432 U.S. 282 (1977). It is only in the egregious case, where a juror is shown to be utterly unable to render an impartial judgment, that a violation of the Due Process Clause will be found. *Irvin v. Dowd*, 366 U.S. 717 (1961).

For example, the Ohio Supreme Court articulated the above principle in *State v. Zuern*, 32 Ohio St.3d 56 (1987), *cert. denied*, 484 U.S. 1047 (1988):

> We feel it is reasonable to state that a juror's knowledge concerning the existence of certain facts is separable from the juror's capability to act impartially in considering matters presented to him for determination. While trial courts rather uniformly seek to control juror knowledge in order to prevent bias, it is a fact of life that a great many trials occur in communities where significant and potentially prejudicial facts are made known about the defendant.

Id. at 60. Thus, in *Zuern* the Court denied a mistrial where an inmate witness disclosed that the defendant was in jail on a pending murder charge at the time he stabbed a corrections officer. The Court found no error in light of both the extensive *voir dire* that was permitted during jury selection to establish the jurors' impartiality and the further instructions that were provided to the jury by the trial court.

Petitioner's argument here rests on an entirely fallacious premise — that the jurors will not only speculate about the effect of the other capital sentence, but that they will speculate about it *in a particular way*, such that they will be more likely to impose the death penalty themselves in this particular case. Yet judicial speculation as to what individual jurors might speculate is a dangerous and very unpredictable exercise. See, e.g., *Dobbert v. Florida*, 432 U.S. at 294 & n.7 (observing that knowledge of the very same fact could incline some jurors to rigor and others to leniency); *Darden v. Wainwright*, 477 U.S. at 184 n.15 (same). In *California v. Ramos*, *supra*, this Court rejected a defendant's argument that a jury should be advised that the Governor has the power to commute a capital sentence, because such advice could work to the defendant's disadvantage:

> In fact, advising jurors that a death verdict is theoretically modifiable, and thus not "final," may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.

463 U.S. at 1011.

Thus, even if one were to accept the view that the jury would be led to speculate extraneously in the circumstances of this case, it is not at all clear that the jury would speculate in the fashion proposed by Petitioner. The jury might, in fact, be more prone to impose a life sentence if the individual jurors believed, for example, that they had been somehow absolved from making the weighty choice between life and death, since that choice had already been made definitively by some other jury in an entirely different case.

Even more important, it is altogether unclear that a jury would speculate at all about the effect and application of the other capital sentence. The fact that another jury had convicted Petitioner of an independent murder was itself clearly relevant to two of the aggravating circumstances then before the jury for consideration, *viz.*, previous commission

of a "felony involving the use or threat of violence" and "the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Thus, evidence of the prior murder itself would properly tend to lead the jury to the conclusion that a capital sentence was appropriate in this case. What Petitioner posits is that this jury's awareness of the additional extraneous fact that Petitioner was under another capital sentence would make the difference in this jury's determination between a sentence of life and death on the facts of this case.[1] Yet this is speculation running amok. It is far more likely that the jury would conclude instead that the death penalty was appropriate in this case because the defendant had committed a previous murder, and the particular sentence that the jury had imposed in the prior case would be at most a marginal factor in its considerations.

Moreover, in this case the jury was given a verdict and sentence form that informed them of the previous murder committed by Petitioner and the capital sentence he received in that case. The verdict and sentence form, however, showed both that Petitioner intended to appeal his conviction in the prior case and that the execution date set for the prior murder conviction was actually several weeks before the start of his trial in this case. Since Petitioner obviously had not been executed at the time this trial went forward, the jury — to the extent they would speculate about the document at all — would very likely understand that the prior capital

[1] The court below held that "prior commission of a violent felony" could no longer be an aggravating circumstance once the prior conviction had been overturned, but that the prior overturned conviction would still have been relevant to the jury's consideration of whether the defendant poses a "continued threat to society." *Romano v. State*, 847 P.2d 368, 389 (Okla. Crim. App. 1993). Accordingly, the court below did not overturn the death penalty even though one aggravating factor fell, since another valid aggravating factor continued to exist. See *id.* And because the prior conviction for murder is still relevant to an aggravating factor, it remains entirely speculative whether the jury's knowledge of the prior capital sentence would have any effect on its deliberations at all.

sentence could not be a final sentence upon Petitioner, and indeed it was later overturned by a reviewing court.

Finally, it is a fundamental principle of law that a jury is capable of receiving and acting according to jury instructions. *Cupp v. Naughten*, 414 U.S. 141 (1973). And there is no reason to believe the jury did not follow the trial court's instructions in this case. In *Cupp*, the Court did not find a violation of due process even though the jury had been given a "universally condemned" instruction on "presumption of truthfulness," since the jury had also been instructed on the defendant's presumption of innocence and on their obligation to find that the State had proved the defendant's guilt beyond a reasonable doubt. The Court stated:

> In this case, while the jury was informed about the presumption of truthfulness, it was also specifically instructed to consider the manner of the witness, the nature of the testimony, and any other matter relating to the witness' possible motivation to speak falsely. It thus remained free to exercise its collective judgment to reject what it did not find trustworthy or plausible.

414 U.S. at 149.

Similarly, in this case the jury remained free to exercise its collective judgment about life or death, despite the extraneous admission of the other capital sentence. As the court below noted, the jurors had been extensively instructed here about their obligations and responsibilities:

> The instructions given to the jury provided sufficient guidance as to how their judgment should be exercised. In this light, it is highly unlikely that the jury's sense of responsibility would have been diminished . . .

Romano v. State, 847 P.2d 368, 390 (Okla. Crim. App. 1993).

III. THE COURT SHOULD USE THE STANDARD OF *DONNELLY v. DeCHRISTOFORO*, 416 U.S. 637 (1974), IN DETERMINING WHETHER ADMISSION OF A PRIOR SENTENCE OF DEATH VIOLATES DUE PROCESS IN A PARTICULAR CASE.

Petitioner cites various state decisions in support of his position. See *People v. Davis*, 452 N.E.2d 525 (Ill. 1983); *People v. Hope*, 508 N.E.2d 202 (Ill. 1986); *West v. State*, 463 So. 2d 1048 (Miss. 1985). Contra *State v. Bell*, 393 S.E.2d 364 (S.C.), *cert. denied*, 498 U.S. 881 (1990). Interestingly, however, the only favorable state decisions cited by Petitioner were decided not on constitutional due process grounds, but instead were decided on pure state-law grounds of whether certain evidence could be introduced in a capital sentencing proceeding under state statutes. Indeed, none of the decisions cited by Petitioner even mentions *Caldwell* at all, though the contrary decision by the South Carolina Supreme Court in *Bell* does specifically reject the view that *Caldwell* has any application to the issue raised here. This general reluctance to apply *Caldwell* in cases similar to this one is significant; it further suggests that Petitioner seeks to misapply its specific holding here. As this Court has previously observed, "the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution." *Dugger v. Adams*, 489 U.S. at 409; see also *Sawyer v. Smith*, 497 U.S. at 239 (argument made to the contrary is flawed).

Whatever the resolution of the various state courts may have been in particular cases, the amici States submit that the proper legal standard for judging whether a constitutional violation has occurred in such cases is found not in *Caldwell*, but in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

In *Sawyer v. Smith*, *supra*, this Court explained the relationship between a *Caldwell* claim and a *Donnelly* claim. In *Sawyer*, the Court refused to apply *Caldwell* to a case that was already final on the date *Caldwell* was decided. Under this Court's retroactivity decisions, a new rule of constitutional law is not generally applied retroactively to

cases that are already final at the time of decision. *Teague v. Lane*, 489 U.S 288 (1989).

In *Sawyer*, the Court held that *Caldwell* announced a new rule of law — an Eighth Amendment guarantee of sentencing reliability free from the distorting taint of misleading comments, which guarantee was afforded over and above the general due process standard of fundamental fairness that was set out in *Donnelly*. See 497 U.S. at 233-37. The *Caldwell* rule was designed to enhance the reliability of the sentencing process in those cases where the process itself had been rendered fundamentally defective; *Caldwell* carried out this mandate by requiring reversal of a death penalty when a mere potential for error existed, rather than only in circumstances where prejudice had been actually established.

However, as set out above, no *Caldwell* error was committed here. There was no affirmative misleading of the jury, no "false prosecutorial comment," *Sawyer*, 497 U.S. at 235, and no "false information [that] might produce 'substantial unreliability as well as bias in favor of death sentences,' " *id.* at 233 (quoting *Caldwell*, 472 U.S. at 330). Thus, since *Caldwell* does not apply, the residual *Donnelly* standard does.

In *Donnelly*, the Court evaluated a prosecutor's closing argument against a due process standard and held:

> . . . not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice."

416 U.S. at 642 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)). In *Donnelly*, the Court looked at a trial as one entire whole and held that alleged due process errors need to be judged against the larger context of the entire trial, rather than being taken in isolation, to determine whether the defendant was deprived of "fundamental fairness." The

same standard should be applied here to judge the validity of a capital sentencing determination in the absence of any *Caldwell* error.

Here, there is no specific *Caldwell* violation and nothing in this capital sentencing process was judged by the Oklahoma courts to constitute reversible error under state law. All that is alleged is a minor departure from a process which is itself entirely fair. In *Donnelly*, the Court stated:

> . . . it is by no means clear that the jury did engage in the hypothetical analysis suggested by the majority of the Court of Appeals, or even probable that it would seize such a comment out of context and attach this particular meaning to it.

416 U.S. at 644. Similarly, it is unclear that the jury here would even engage in the speculative analysis suggested by Petitioner, attach meaning to this extraneous fact in carrying out its duties, or draw from it the adverse conclusion that Petitioner has suggested. On the contrary, this jury was carefully and properly instructed in regard to its responsibilities. Speculation thus should not suffice to set aside the results of this trial and sentencing as being "so fundamentally unfair as to deny him due process." *Id.* at 645.

CONCLUSION

For the reasons stated above, as well as those stated in the Brief for Respondent, the decision of the Oklahoma Court of Criminal Appeals should be affirmed.

Respectfully submitted,

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January 18, 1994